Supreme Court, U. S.
FILED
FEB 10 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-966.

EDWIN D. WOLF, FLORA B. WOLF, MARC D. JONAS, SHERYL B. JONAS, FRANK J. WINNERMARK, CAROL A. WINNERMARK, CLIFFORD G. SAWYER, VIVIAN K. SAWYER, THOMAS D. SELLS, MARY B. SELLS, LUDWIG J. SPOLYAR, KIRSTEN SPOLYAR, IRVING H. PERLMUTTER, MARCIA L. PERLMUTTER, SAMUEL BLANK, HARRY STEIN and GLORIA DAROVIC,

Petitioners,

v.

TRANS WORLD AIRLINES, INC. and FLYING MERCURY, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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COUNTERSTATEMENT OF QUESTION PRESENTED.

Should this Court grant certiorari in a case where the court below, consistently with other courts of appeals, correctly applied the guidelines established in *Cort v. Ash*, 422 U. S. 66 (1975), in holding that a private federal remedy should not be implied from § 403(b) of the Federal Aviation Act, 49 U. S. C. § 1373(b), for international tour passengers who claim that their land-based accommodations were misrepresented in airline advertising brochures?

COUNTERSTATEMENT OF THE CASE.

In this Rule 23(b)(3) class action, plaintiffs sued Trans World Airlines, Inc., an air carrier, and Flying Mercury, Inc., a travel agency, to recover compensatory and punitive damages for some 17,000 purchasers of a European excursion package known as "Mini Tours."[1] They alleged that their sleeping accommodations were misrepresented in the advertising brochures issued by the airlines and the travel agency.

In their original complaint they claimed that federal jurisdiction over their private causes of action should be implied under §§ 403(b), 404(b) and 411 of the Federal Aviation Act, 49 U. S. C., §§ 1373(b), 1374(b) and 1381, as well as under § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45.[2] They also asserted pendent claims under the laws of various states for fraud, misrepresentation and breach of contract.

Since the District Court found no significant distinction between this case and *Polansky v. Trans World Airlines*, 523 F. 2d 332 (3d Cir. 1975), it dismissed the complaint on November 7, 1975, including the pendent state law claims and class allegations.

On October 14, 1976, the Court of Appeals for the Third Circuit affirmed the judgment of the District Court, applying the guidelines laid down by this Court in *Cort v. Ash*, 422 U. S. 66 (1975). It found no basis for implying a private remedy on behalf of disgruntled air tour passengers whose sleeping accommodations did not conform to the advertising brochures. Such claims, the court concluded, were never intended by Congress to be brought in federal courts under the Federal Aviation Acts; they are better left for disposition to the state courts under traditional common law and statutory remedies for fraud, misrepresentation and breach of contract.

1. Under the tour package transatlantic air passage was offered at a substantial discount under regular air fares. Passengers paid a nominal tour fee of $100 for land-based accommodations, car rental and other services for the two-week minimum required so that the package price would qualify under the reduced air tariff.

2. Plaintiffs have abandoned their claims below of implied private rights of action arising under §§ 404(b) and 411 of the Federal Aviation Act, 49 U. S. C. §§ 1374(b), 1381, as well as § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45.

ARGUMENT.

The decision of the Court of Appeals in this case was an elementary application of the guidelines laid down by this Court in *Cort v. Ash*, 422 U. S. 66 (1975), for determining when a private remedy shall be implied from a federal regulatory statute like the Federal Aviation Act. It is entirely consistent with the other decisions by courts of appeals under the Federal Aviation Act which the plaintiffs have pointedly ignored. *Polansky v. Trans World Airlines, Inc.*, 523 F. 2d 332 (3d Cir. 1975); *Mason v. Belieu*, 543 F. 2d 215 (D. C. Cir. 1976). They have attempted instead to contrive an imaginary conflict with old decisions under the Interstate Commerce Act, the Shipping Act, the Communications Act and the Motor Carrier Act, all decided before *Cort v. Ash*, involving different regulatory provisions.[3] Plaintiffs academic exercise in examining these imaginary conflicts does not merit the attention of this Court.

In its earlier decision in *Polansky v. Trans World Airlines*, 523 F. 2d 332 (3d Cir. 1975), the court below declined to find an implied private remedy under §§ 404(b) and 411 of the Federal Aviation Act, 49 U. S. C. §§ 1374(b) and 1381, in favor of disgruntled tour passengers, who, like the plaintiffs here, claimed that the advertising literature misrepresented the hotel accommodations and other land-based services provided them. Applying the *Cort* tests, the court declined "to widen the application of this statute to forms of conduct it was not enacted to cover", *Id.* at 336, concluded that implying a

3. Plaintiffs asserted none of these portentous consequences in the court below; they simply made their own *Cort* analysis and arrived at a different result from that of the court's analysis in *Polansky*.

Their quibbling disagreement with the court's application of the *Cort* guidelines in the second reason for granting the writ (Petition, pp. 14-16), presents no question which this Court need consider.

private remedy for this alleged breach of contract would be inconsistent with the statutory scheme of the Federal Aviation Act, and found that there was no federal interest in implying a private federal cause of action, where state remedies for breach of contract, breach of warranty or fraudulent misrepresentation were adequate. 523 F. 2d at 337-338.

The Court of Appeals for the District of Columbia Circuit followed *Polansky's* application of the *Cort* standards in determining its authority to imply a private remedy under the Federal Aviation Act and refused to find an implied cause of action on behalf of the wife of a passenger who was refused passage on an airline when the airline failed to explain his absence at the time and place of his intended destination. *Mason v. Belieu*, 543 F. 2d 215 (D. C. Cir. 1976). The Court of Appeals concluded that the plaintiff's interest in that case was outside the primary objective of the Federal Aviation Act to promote adequate economical and efficient service by air carriers at reasonable charges without unjust dsicriminations, undue preferences or disadvantages or unfair or destructive competitive practices, "just as protecting tourists from unsatisfactory hotel accommodations is too far removed from this primary purpose to imply a private remedy." *Id.* at 221. Applying the fourth *Cort* test, the Court of Appeals held:

> "Finally, claims like Mrs. Mason's which lie outside the major aim of the Act should be relegated to remedies provided by the Act itself or by traditional tort principles of state law. The statute provides adequate protection of the general public's interest in nondiscriminatory treatment at ground facilities by allowing the CAB to seek an injunction prohibiting violations, section 1007(a), 49 U. S. C. § 1478(a) (1970), or to request enforcement of the antidiscrim-

ination provision by the Attorney General, section 1007(b), 49 U. S. C. § 1478(b). *See, e.g. United States v. City of Montgomery,* 1201 F. Supp. 590, 594 (M. D. Ala. 1962) (racial discrimination in public restrooms at airport)." *Id.* at 221-222.

Without so much as mentioning *Polansky* or *Mason v. Belieu,* plaintiffs pretend to find a conflict between the decision below and a vast array of decisions under § 6(7) of the Interstate Commerce Act, 49 U. S. C. § 6(7) (Petition, pp. 11-13). Every one of those cases was a suit by a carrier to recover undercharges under its applicable tariff.[4] Nothing in the decision in this case impugns the validity of those decisions. The application of the *Cort* factors to preclude a private federal remedy here for misrepresentation of land-based accommodations in advertising brochures does not remotely inhibit a carrier from suing for undercharges under its tariffs.

Beyond this, there are significant differences between Part I of the Interstate Commerce Act and the Federal

4. The section 6(7) cases on which plaintiffs rely are: *Louisville & Nashville Railroad Co. v. Rice,* 247 U. S. 201 (1918); *Crancer v. Lowden,* 315 U. S. 631 (1942); *Louisville & Nashville Railroad Co. v. Central Iron & Coal Co.,* 265 U. S. 59 (1924); *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Fink,* 250 U. S. 577 (1919); *Louisville & Nashville Railway Co. v. Maxwell,* 237 U. S. 94 (1915); *Button v. Atchison, Topeka & Santa Fe Railway Co.,* 1 F. 2d 709 (8th Cir. 1924); *Penn Central Co. v. General Mills, Inc.,* 439 F. 2d 1338 (8th Cir. 1971); *Chicago, Burlington & Quincy Railroad Co. v. Ready Mixed Concrete Co.,* 487 F. 2d 1263 (8th Cir. 1973); *Southern Pacific Co. v. Miller Abattoir Co.,* 454 F. 2d 357 (3d Cir. 1972); *Cincinnati, New Orleans & Texas Pacific Railway v. Chesapeake & Ohio Railway,* 441 F. 2d 483 (4th Cir. 1971); *Chicago & North Western Ry. v. Hunt-Wesson Foods,* 504 F. 2d 905 (7th Cir. 1974); *Bernstein Bros. Pipe & Machinery Co. v. Denver & R. G. W. R. Co.,* 193 F. 2d 441 (10th Cir. 1951); *Atchison, Topeka & Santa Fe Railway v. Bouziden,* 307 F. 2d 230 (10th Cir. 1962); *Chicago, Milwaukee, St. Paul & Pacific Railroad Co. v. Pittsburgh-Des Moines Steel Co.,* 411 F. Supp. 518 (S. D. Iowa 1976); and *Atchison, Topeka & Santa Fe Railway v. Kinkade,* 203 F. 165 (D. Kan. 1912) (Petition, 11-13).

Aviation Act. Most notably, § 8 of Part I of the Interstate Commerce Act provides that a rail carrier subject to regulation under that chapter of the Act is liable to those persons injured by any act of the rail carrier declared unlawful by the chapter for "the full amount of the damages sustained." Furthermore, § 9 of the Interstate Commerce Act explicitly provides a right of action in federal court for damages suffered by any person as a result of a regulated carrier's violation of the provisions to which it is subject under the chapter. Finally, §§ 13(1) and 16 of Part I give a shipper a right to seek a reparation order from the Interstate Commerce Commission and to enforce the award in the courts. There are no comparable provisions in the Federal Aviation Act.

This Court ruled that the conspicuous absence of such provisions from the Motor Carrier Act precluded a finding that Congress intended a private right of action for shippers under that Act. *T.I.M.E., Inc. v. United States,* 359 U. S. 464 (1959). This Court's decision in *T.I.M.E.* should control in the case *sub judice* not only because of the noted similarities between the Motor Carrier Act and the Federal Aviation Act, *Moss v. CAB,* 430 F. 2d 891, 898 n. 30 (D. C. Cir. 1970), but also because of the factual analogy between *T.I.M.E.* and *Wolf.* In *T.I.M.E.,* a shipper resisted a claim by the motor carrier for the full tariff on the ground that the tariff was unreasonable and that the shipper, therefore, had a right of reparation. Similarly, in *Wolf* the petitioners allege that the rate charged was unreasonable because hotel accommodations which were required to be provided under the effective tariff were for all practical purposes impossible to utilize. Thus, as in *T.I.M.E.,* the *Wolf* petitioners claim that the rate stipulated in the filed tariff was unreasonable in light of what they actually received.

In *T.I.M.E.*, this Court concluded that no private right of action for reparation could be implied from the Motor Carrier Act:

> "We find it impossible to impute to Congress an intention to give such a right [of reparation] to shippers under the Motor Carrier Act when the very sections which established that right in Part I [of the Interstate Commerce Act] were wholly omitted in the Motor Carrier Act."

359 U. S. at 471. Since the very sections which give a private right of action in Part I of the Interstate Commerce Act are conspicuously absent from the Federal Aviation Act, and if, as plaintiffs contend, § 6(7) of the Interstate Commerce Act was the model for § 403(b) of the Federal Aviation Act, then the absence of these reparation provisions from the Federal Aviation Act must, as in *T.I.M.E.*, be read to preclude the imputation of a legislative intent to imply a private right of action under § 403(b).[5]

The Federal Aviation Act cases relied upon by plaintiffs to demonstrate a conflict here do no such thing.

5. Plaintiffs' additional claim that *American Telephone and Telegraph Co. v. Florida-Texas Freight, Inc.*, 485 F. 2d 1390 (5th Cir. 1973), *affirming*, 357 F. Supp. 977 (S. D. Fla. 1973), is in conflict with the decision below is insupportable (Petition, p. 12). Apart from the fact that it is a pre-*Cort* decision which does not even discuss the question of implied private remedy, the Communications Act contains specific provisions making the carrier liable for damages caused by its violation of the Act and providing that the parties so injured may bring suit in the district court for damages, 47 U. S. C. §§ 206, 207.

The Shipping Act cases cited by plaintiffs (Petition, p. 12), *State of Israel v. Metropolitan Dade County*, 431 F. 2d 925 (5th Cir. 1970) and *Compania Anonima Venezolana v. A. J. Perez Export Co.*, 303 F. 2d 692 (5th Cir.), *cert. denied*, 371 U. S. 942 (1962), are both pre-*Cort* cases involving respectively a tariff construction and a subrogation claim. In neither did the court have to determine whether a private remedy is implicit in the tariff provisions of the Act.

United States v. Associated Air Transport, Inc., 275 F. 2d 827 (5th Cir. 1960), and *City Messenger Service v. Capitol Records Distributing Corp.*, 446 F. 2d 6 (6th Cir. 1971), *cert. denied*, 404 U. S. 1059 (1972), are pre-*Cort v. Ash* cases which deprive them of any precedential value in determining an implied private remedy question.[6] Neither deals with the question whether a private remedy is implied under the Federal Aviation Act. In *Associated Air Transport*, the Court of Appeals for the Fifth Circuit merely held that tariff provisions form a part of the contract between the parties and cannot be altered by a separate agreement. The opinion below expressly acknowledges this principle. 544 F. 2d at 137. The Fifth Circuit, of course, did not address the fundamental *Cort* question whether a state court contract remedy would be inadequate, thus creating a need for an implied right of action under the Act. *City Messenger* involved only a determination of a statute of limitations question which, by no stretch of advocacy, could conflict with the holding below that § 403(b) provides no implied private right of action.

6. Plaintiffs' professed concern that the decision below calls into question pre-*Cort* decisions such as *Archibald v. Pan American World Airways, Inc.*, 460 F. 2d 14 (9th Cir. 1972) and *Fitzgerald v. Pan American World Airways, Inc.*, 229 F. 2d 499 (2d Cir. 1956), which will "almost certainly generate additional litigation" (Petition, p. 13), is modest compared with the flood of litigation under the Federal Aviation Act that would be loosed by opening the federal courts to suits like this, *Polansky* and *Mason*.

CONCLUSION.

In this case the Court of Appeals for the Third Circuit correctly applied the guidelines established by this Court in *Cort v. Ash* in determining whether a private federal remedy should be implied from the provisions of the Federal Aviation Act. Its conclusion that no such remedy should be implied in favor of tour passengers who claim that the land-based accommodations provided them were misrepresented in advertising brochures is entirely consistent with the other appellate decisions under the Act. The imaginary conflict contrived by the plaintiffs from other inapposite decisions does not merit this Court's attention.

For these reasons plaintiffs' petition should be denied.

Respectfully submitted,

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